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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

TAYLOR BUILDING CORP. OF AMERICA

Plaintiff

vs.

MARVIN BENFIELD, et. al.

Defendants

CASE NO. 2003 CVE 01565

DECISION/ENTRY

2003 CVE 01565 00071801753 DECI

Santen & Hughes, J. Robert Linneman and C. Gregory Schmidt, for the plaintiff Taylor Building Corp. of America, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202

Nichols, Speidel & Nichols, Donald W. White, for the defendants Marvin and Mary Ruth Benfield, 237 Main Street, Batavia, Ohio 45103

This cause is before the court on a motion to stay judicial proceedings pending mediation and/or arbitration filed by the plaintiff Taylor Building Corp. of America ("Taylor Building Corp."). The motion was filed on November 26, 2004, on the same day that Taylor Building Corp. filed its complaint in this case.

In its complaint, Taylor Building Corp. seeks judgment against the defendants Marvin Benfield and Mary Ruth Benfield for work performed in building a home for the Benfields. The causes of action alleged in the complaint are breach of contract, unjust enrichment, and quantum meruit.

In its complaint, Taylor Building Corp. also seeks to foreclose on a mechanic's lien which was filed against the defendants' property.

In addition to filing an answer denying the essential allegations of the plaintiff's complaint, the defendants raise the following affirmative defenses: 1) waiver of the mediation and arbitration clauses of the contract and 2) failure to include all necessary parties.

In their counterclaim, the defendants assert the following causes of action: 1) deceptive and unconscionable consumer sales practices under the Ohio Consumer Sales Practices Act, 2) breach of contract, 3) failure to construct in a workmanlike manner, 4) fraudulent inducement to enter into the contract, 5) fraudulent inducement to enter into the arbitration agreement, and 6) unconscionability.

In its motion for stay of proceedings, the plaintiff Taylor Building Corp. asserts that the proceeding should be stayed until the case can be mediated or arbitrated in accordance with the terms of the contract entered into by the parties.

The court scheduled and held a hearing on the plaintiff's motion. At the conclusion of the hearing, the court took the motion under advisement.

Upon consideration of the plaintiff's motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

The validity of arbitration provisions has been codified by the General Assembly. R.C. 2711.01 provides in part:

> "(A) A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or

> out of the refusal to perform the whole or any part of the contract, * * * shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract."

R.C. 2711.03 states that a party aggrieved by the failure of another to submit to arbitration may petition a common pleas court for an order directing that arbitration proceed in the manner provided for by a written agreement.

R.C. 2711.02 then provides:

> "If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement * * *."

As an initial matter, it must be noted that public policy in Ohio encourages the resolution of disputes through arbitration.[1] A presumption favoring arbitration arises when the claim in dispute falls within the scope of the arbitration provision.[2]

Furthermore, any uncertainty regarding the applicability of an arbitration clause should be resolved in favor of coverage.[3] An arbitration clause should not be denied effect unless it can be determined to a high degree of certainty that the clause does

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[1] *Stehli v. Action Custom Homes, Inc.* (Sept. 24, 1999), 11th Dist. No. 98-G-2189, citing *Kelm v. Kelm* (1993), 68 Ohio St.3d 26, 27, 623 N.E.2d 39; *Youghiogheny & Ohio Coal Co. v. Oszust* (1986), 23 Ohio St.3d 39, 41, 491 N.E.2d 298; *Dayton Teachers Assn. v. Dayton Bd. of Edn.* (1975), 41 Ohio St.2d 127, 132-133, 323 N.E.2d 714.

[2] *Vincent v. Neyer* (2000), 139 Ohio App.3d 848, 851, 745 N.E.2d 1127 citing *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471, 700 N.E.2d 859.

[3] *Stehli*, supra.

not cover the asserted dispute.[4]

The contract between the parties in the case sub judice reads:

> "15 (a) Mediation- That in the event of **any** dispute between First Party and Second Party as to the quality of construction, quality of materials, contract disputes or similar disputes as to the construction, the parties shall endeavor to settle the dispute in an amicable manner by mediation administered by the American Arbitration Association under its construction industry mediation rules. Notices of the demand for mediation shall be filed with a copy of this Construction Agreement with the American Arbitration Association and to the other party to this agreement. The site for the mediation shall be Louisville, Kentucky (Jefferson County) arbitration.
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> (b) Arbitration- In the event the issues cannot be resolved by mediation, then any claims or disputes arising out of this Construction Agreement or the alleged breach thereunder shall be settled by **mandatory and binding** arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association unless both parties mutually agree otherwise. (This position shall not affect First Party's right to secure a mechanic's lien and to pursue those remedies described in Sections 6 and 9 hereof.) Notices of the demand for arbitration shall be filed with a copy of this Construction Agreement with the American Arbitration Association and the other party to this Agreement. The site for the arbitration proceeding shall be Louisville, Kentucky (Jefferson County)."

Both the mediation and arbitration clauses contained in the contract are very broad in their scope and would cover all the claims asserted by the parties in this case.

The defendants make several arguments as to why they should not be forced to

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[4] *Stehli*, citing *Grcar v. Lanmark Homes, Inc.* (June 12, 1992), 11th Dist. No. 91-L-128; see, also, *Independence Bank v. Erin Mechanical* (1988), 49 Ohio App.3d 17, 18, 550 N.E.2d 198; *Gibbons-Grable Co. v. Gilbane Bldg. Co.* (1986), 34 Ohio App.3d 170, 173, 517 N.E.2d 559.

undergo arbitration.

First, the defendants argue that their claims brought under the Consumer Sales Practice Act (CSPA) are not arbitrable where they are seeking rescission of the contract.

With regard to this first argument, nothing in the CSPA precludes arbitration clauses in consumer sales contracts.[5] This is true even when a party is seeking rescission of the contract.[6]

R.C. 1345.04 provides:

> "The courts of common pleas, and municipal or county courts within their respective monetary jurisdiction, have jurisdiction over any supplier with respect to any act or practice in this state covered by sections 1345.01 to 1345.13 of the Revised Code, or with respect to any claim arising from a consumer transaction subject to such sections."[7]

However, this statute's grant of jurisdiction to common pleas, municipal, and county courts does not concomitantly act as a prohibition against arbitration.[8] While R.C. 1345.04 obviously does confer jurisdiction on courts to hear actions based on R.C. Chapter 1345, there is nothing in the statute to suggest that parties to a consumer transaction covered by the CSPA cannot agree to arbitrate such matters.[9]

Indeed, there is no reason why parties to a contract can not arbitrate legal claims

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[5]See *Vincent*, supra, citing *Smith v. Whitlatch & Co.* (2000), 137 Ohio App.3d 682, 685, 739 N.E.2d 857.
[6]See *Vincent*; see, also, *Karamol v. Continental Estates, Inc.* (Sept. 22, 2000), 6th Dist. No. WD-00-21; *Haga v. Martin Homes, Inc.* (Apr. 19, 1999), 5th Dist. No. 1998AP050086.
[7]R.C. 1345.04.
[8]*Stehli*, supra.
[9]*Stehli*, citing *Zalecki v. Terminix Internatl., Inc.* (Feb. 23, 1996), 6th Dist. No. L-95-156.

arising under the CSPA in the same manner that numerous other statutory claims are resolved through some form of alternative dispute resolution.[10]

Additionally, R.C. 2711.01(B) and (C) set forth those controversies to which the arbitration statutes do not apply, and controversies arising out of the CSPA are not listed therein.[11]

Finally, there is nothing in Ohio law which would specifically prohibit an arbitrator from awarding treble damages and attorney fees to a consumer who prevails on a claim arising under the CSPA.[12] Likewise, there is no provision of law that would preclude the arbitrator from rescinding the contract.

As a result, the court finds that the respective claims which are brought by the parties in this case are arbitrable under the terms of the agreement entered into by the parties.

The defendants' second argument is that the plaintiff waived the right to arbitrate when it filed a lawsuit seeking foreclosure of a mechanic's lien.

Notwithstanding the preference for enforcement of agreements to arbitrate, it is well-settled that either party to an arbitration agreement may waive it.[13] For example, "a plaintiff's waiver may be effected by filing suit."[14]

While a party to an arbitration agreement may waive the right to proceed with

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[10] *Stehli.*
[11] *Vincent*, supra.
[12] *Stehli*, citing *Smith v. Ohio State Home Services, Inc.* (May 25, 1994), 9th Dist. Nos. 16441 and 16445.
13 *Peridia, Inc. v. Showe Construction Co., Inc.* (Mar. 14, 2003), 6th Dist. No. OT-02-027. 2003-Ohio-1415, at ¶ 14, citing *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App.2d 111, 113, 430 N.E.2d 965.
14 *Peridia*, at ¶ 15; see, also, *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1992), 79 Ohio App.3d 126, 128, 606 N.E.2d 1054.

arbitration, the defendants are not correct in their argument that the filing of suit always constitutes such a waiver.[15] In order to prove that a defending party waived its right to arbitration pursuant to R.C. 2711.02, "the complainant is required to demonstrate that the defending party 'knew of an existing right to arbitration * * * and acted inconsistently with that right to arbitrate' "[16]

Such a determination must be made by the trial court "based on the totality of the circumstances."[17] When viewing the "totality of the circumstances," the court must consider the following factors: (1) whether the party seeking arbitration invoked the jurisdiction of the court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of the proceedings; (2) the delay, if any, by the party seeking arbitration to request a stay of the judicial proceedings, or an order compelling arbitration; (3) the extent to which the party seeking arbitration has participated in the litigation, including a determination of the status of discovery, dispositive motions, and the trial date; and (4) whether the nonmoving party would be prejudiced by the moving party's prior inconsistent actions.[18]

In considering the totality of the circumstances in the case sub judice, the fact the contract provided for arbitration did not preclude the plaintiff from protecting its legal interest by filing a mechanic's lien prior to any arbitration.[19] Although the plaintiff then filed suit, it did so only in response to the defendants' R.C. 1311.11 notification, and

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15 See *Baker-Henning Productions, Inc. v. Jaffe* (Nov. 7, 2000), 10th Dist. No. 00AP-36.
16 *Peridia, Inc.*, at ¶ 15, citing and quoting *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 413, 701 N.E.2d 1040, quoting *Phillips v. Lee Homes, Inc.* (Feb. 17, 1994), 8th Dist. No. 64353.
17 *Peridia, Inc.*, citing *Harsco Corp.* at 413- 414.
18 Id.
19 *R.L. Bates Co. v. Schmidt* (Dec. 29, 1998), 5th Dist. No. 98CAE07031.

immediately thereafter moved the trial court for a stay of the proceedings.[20]

The defendants argue that the contract does not permit the plaintiff to both file an action seeking foreclosure of its mechanic lien and to seek arbitration. However, the defendants are incorrect. As indicated above, the arbitration clause itself contains language that permits the plaintiff to pursue other remedies as set forth in sections 6 and 9 of the contract. Section 9 of the contract then expressly states: "In the event of default by Second Party [the defendants], it is agreed that in addition to or in lieu of its remedies for breach of contract, the First Party [the plaintiff] may enforce its [mechanic's] lien as liens against real estate are enforced."

In Ohio, if the various clauses of a contract are severable from one another, the contract will be enforced to the extent possible.[21] The court may not rewrite or revise the contract, and should enforce a contract to the extent that it is legal and enforceable.[22]

Courts must look to the intention of the parties.[23] The intention of the parties is discovered by use of the rules of construction, the language of the contract, the subject matter of the contract, the parties' respective situations, the circumstances surrounding the transaction that is the subject of the contract, and the conduct of the parties that demonstrates the construction they themselves placed upon the contract.[24]

Applying the above factors to this situation, the court finds the arbitration

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20 See id.
21 *Newell v. Marc W. Lawrence Bldg. Corp.* (May 8, 1995), 5th Dist. No. 94-CA-292.
22 Id., citing *Toledo Police Patrolmen's Association v. City of Toledo* (1994), 94 Ohio App.3d 734, 740, 641 N.E.2d 799.
23 *Newell.*
24 Id., citing *Huntington & Finke Co. v. Lake Erie Lumber & Supply Co.* (1924), 109 Ohio St. 488, 143 N.E. 132, syllabus.

provision severable from the provision permitting the filing of a mechanic's lien. Under the terms of the contract, the plaintiff's filing of an action to foreclose a mechanic's lien is not inconsistent with its motion seeking to compel arbitration.

Moreover, aside from the filing of the complaint, the only legal action taken by the plaintiff in this case has been in response to the defendants' attempts to avoid arbitration.[25]

Additionally, neither party has expended time or money conducting discovery, pretrial motions, or trial preparation.[26] As such, this is not a case where the defendants will be prejudiced by dilatory conduct by the plaintiff. [27]

Accordingly, in applying the analytical framework set forth above to the facts of this case, the court is unable to conclude that the plaintiff has waived its right to seek arbitration in accordance with the contract.

The defendants' third argument is that the contract entered into between the parties is unconscionable.

An arbitration clause may be found to be unenforceable on grounds existing at law or in equity for the revocation of a contract.[28] The issue of unconscionability is a question of law.[29]

In making a determination as to whether a contract is unconscionable, a factual

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25 See id.
26 See id.
27 See id.
28 *Eagle v. Fred Martin Motor Co.* (Feb. 25, 2004), 157 Ohio App.3d 150, 159, 809 N.E.2d 1161, 2004-Ohio-829, at ¶ 16, citing R.C. 2711.01(A); *Pinette v. Wynn's Extended Care, Inc.* (Sept. 3, 2003), 9th Dist. No. 21478, 2003-Ohio-4636, at ¶ 7.
29 *Eagle*, 157 Ohio App.3d at 156, at ¶ 12, citing *Bank One, NA v. Borovitz*, 9th Dist. No. 21042, 2002-Ohio-5544, at ¶ 12, citing *Ins. Co. of N. Am. v. Automatic Sprinkler Corp.* (1981), 67 Ohio St.2d 91, 98, 423 N.E.2d 151.

inquiry into the particular circumstances of the transaction in question is required.[30] Such a determination requires a case-by-case review of the facts and circumstances surrounding the agreement.[31]

An unconscionable contract clause is one in which there is an absence of meaningful choice for the contracting parties, coupled with draconian contract terms unreasonably favorable to the other party.[32] Thus, the doctrine of unconscionability consists of two separate concepts:

> "(1) [U]nfair and unreasonable contract terms, i.e., 'substantive unconscionability,' and (2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, i.e., 'procedural unconscionability[.]' * * * These two concepts create what is, in essence, a two-prong test of unconscionability. One must allege and prove a 'quantum' of both prongs in order to establish that a particular contract is unconscionable." (Citations omitted.)[33]

Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability.

However, courts examining whether a particular limitations clause is

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30 *Eagle*, 157 Ohio App.3d at 157, at ¶ 13, citing *Lightning Rod Mut. Ins. Co. v. Saffle* (Nov. 6, 1991), 9th Dist. No. 15134.
31 *Eagle*, citing *Burkette v. Chrysler Industries, Inc.* (1988), 48 Ohio App.3d 35, 37, 547 N.E.2d 1223; *Vincent*, 139 Ohio App.3d at 854-856.
32 *Eagle*, 157 Ohio App.3d at 163, at ¶ 30, citing *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294.
33 *Eagle*, citing *Collins*, 86 Ohio App.3d at 834.

substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability.[34] Moreover, arbitration clauses are generally unconscionable where the "clauses involved are so one-sided as to oppress or unfairly surprise [a] party."[35]

Procedural unconscionability, on the other hand, exists when it is determined that there was no voluntary meeting of the minds by the parties to the contract under circumstances particular to that contract.[36] With respect to procedural unconscionability, a court must consider factors bearing on the relative bargaining position of the contracting parties, including age, education, intelligence, business acumen, experience in similar transactions, whether the terms were explained to the weaker party, and who drafted the contract.[37] Additionally, the court should consider whether the party who claims that the terms of a contract are unconscionable was represented by counsel at the time the contract was executed.[38] "The crucial question is whether 'each party to the contract, considering his [or her] obvious education or lack of it, [had] a reasonable opportunity to understand the terms of the contract, or were the important terms hidden

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34 *Small v. HCF of Perrysburg, Inc.* (2004), 159 Ohio App.3d 66, 70, 823 N.E.2d 19, 2004-Ohio-5757, at ¶ 21.
35 *Eagle*, at ¶ 32, citing *Neubrander v. Dean Witter Reynolds, Inc.* (1992), 81 Ohio App.3d 308, 311- 312, 610 N.E.2d 1089, quoting Black's Law Dictionary (5th Ed.Rev.1979) 1367.
36 *Vanyo v. Clear Channel Worldwide* (Apr. 8, 2004), 156 Ohio App.3d 706, 712, 808 N.E.2d 482, at ¶ 17.
37 *Eagle*, at ¶ 31, citing *Johnson v. Mobil Oil Corp.* (E.D.Mich.1976), 415 F.Supp. 264, 268.
38 *Eagle*, citing *Bushman v. MFC Drilling, Inc.* (July 19, 1995), 9th Dist. No. 2403- M.

in a maze of fine print * * * ?' "[39]

In order to negate an arbitration clause, a party must establish a quantum of both substantive and procedural unconscionability.[40]

The court will first examine the facts of this case to determine if there is evidence of substantive unconscionability. The defendants argue that several terms in the contract are unconscionable.

The defendants argue first that there is no provision in the contract informing them that they were waiving their right to a trial by jury by agreeing to the arbitration provision. However, the loss of the right to a jury trial is an obvious consequence of an agreement to arbitrate and, in the absence of indicia of an adhesion contract, a party to an arbitration agreement is bound even if the clause does not expressly reference the right to a jury trial. [41]

The defendants next argue that it is unconscionable to require them to pay attorney fees in the event the plaintiff has to enforce its rights under the contract while not according them their own attorney fees if they prevail. However, mutuality of obligation in contract law does not mean that each party must have the exact same obligations.[42] Nowhere in the definition of consideration is there a requirement that the

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39 *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 383, 613 N.E.2d 183, citing and quoting *Williams v. Walker-Thomas Furniture Co.* (C.A.D.C.1965), 350 F.2d 445, 449.
40 *Small*, at ¶ 23; see, also, *Vanyo*, 156 Ohio App.3d at 712, at ¶ 17.
41 *Garcia v. Wayne Homes*, LLC (Apr. 19, 2002), 2nd Dist. No. 2001 CA 53, 2002-Ohio-1884.
42 *Robbins v. Country Club Retirement Center IV, Inc.* (Mar. 17, 2005), 7th Dist. No. 04 BE 43, 2005-Ohio-1338, at ¶ 24.

benefits or detriments flowing to each party be exactly the same.[43]

Moreover, the contract does not take away any causes of action that would otherwise be available to the defendants. With respect to the specific argument which is made by the defendants, the contract does provide that the defendants are not entitled to take possession of the improvements until full and final payment is made. The plaintiff is only entitled to recover its attorney fees under the limited circumstance where the defendants enter into possession of the real estate in violation of this provision without making full payment. Given that the plaintiff is building a home on the defendants' property, and substantial detriment may be caused to the plaintiff by the defendants taking possession without making payment, the court finds that this particular provision is not unreasonable.

The contract also provides that the arbitration will take place in Louisville, Kentucky, which is the home city of the plaintiff but is not the place where the work took place. This provision is substantively unconscionable, for the reason that it is violative of Ohio law.

In this regard, R.C. 4113.62 provides in pertinent part:

> "D)(2) Any provision of a construction contract, agreement, understanding, specification, or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that requires any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding to occur in another state is void and unenforceable as against public policy. Any litigation, arbitration, or other dispute resolution process provided for in the construction contract,

43 Id. at ¶ 28.

> subcontract, agreement, or understanding shall take place in the county or counties in which the improvement to real estate is located or at another location within this state mutually agreed upon by the parties."

The fact that the out-of-state arbitration provision is unconscionable does not, however, mean that the arbitration clause in its entirely is rendered unenforceable. If a contract or term in a contract is found to be unconscionable at the time that the contract was made, a court may choose either to refuse to enforce the contract, enforce the contract without the unconscionable portion, or limit the application of the unconscionable portion to avoid an unconscionable result.[44]

Here, the arbitration provision "as a whole" is reasonable, and only one term contained therein is unconscionable. R.C. 4113.62 sets forth the appropriate remedy, which is that the arbitration shall take place in the county in which the improvement to real estate is located. Accordingly, the arbitration shall take place in Clermont County.

As to the other terms and provisions of the contract, the court is not persuaded that any of them should be unenforceable herein.[45] There are no one-sided rules drafted as prerequisites for attaining a hearing, and there is no evidence of a substantial fee required as a condition precedent to arbitration.[46] Furthermore, the defendants have presented no evidence that the arbitration costs and fees are prohibitive, unreasonable, and unfair as applied to the defendants.[47] Finally, the court cannot find that the agreement is "weighted heavily" against the weaker party. [48]

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44 *Eagle*, 157 Ohio App.3d at 166, at ¶ 36, citing R.C. 1302.15(A).
45 See *Eagle*, at ¶ 37.
46 See id.
47 See *Eagle*, 157 Ohio App.3d at 171, at ¶ 50.
48 See id.

Meanwhile, the court cannot find any evidence that the contract is procedurally unconscionable. Much of the defendants' argument is premised on the position that the contract entered into by the parties is an adhesion contract.

Under illustration 7, in comment a, the Restatement of the Law 2d (1981), Contracts, ¶ 208, notes that:

> "It is to be emphasized that a contract of adhesion is not unconscionable per se, and that all unconscionable contracts are not contracts of adhesion. Nonetheless, the more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability."

Black's Law Dictionary (5 Ed. Rev.1979) 38, defines an adhesion contract:

> "Standardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms."

Thus, this court is called upon to determine whether the contract entered into between the parties was one of adhesion and, separately, whether the contract was unconscionable.[49] In this regard, there is no evidence that the plaintiff presented this contract to the defendants on a "take it or leave it" basis.

Even if they felt pressured to agree to the arbitration provision, the defendants clearly did not have to buy a home from the plaintiff. There are a multitude of homebuilders in the local area. It is not possible to state that there is inherently unequal bargaining power between these two parties.

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49 See *O'Donoghue v. Smythe, Cramer Co.* (July 3, 2002), 8th Dist. No. 80453, 2002-Ohio-3447, at ¶ 25.

The contract was preprinted. However, a preprinted sales contract containing an arbitration clause that is a condition precedent to the final sale, without more, fails to demonstrate unconscionability of the clause.[50]

The arbitration clause itself was contained in standard rather than fine print. The issues were neither hidden nor out of the ordinary, and there is no evidence that the defendants were hurried through some signature process.[51]

Under these circumstances, the law does not require that each aspect of a contract be explained orally to a party prior to signing.[52] There is a "legal and common sensical-axiom that one must read what one signs."[53] While it is unknown whether the defendants read the arbitration clause, the fact that a party did not read the contract prior to signing it and was not informed of the arbitration provision would not in any event, absent other claims or indicia of adhesion or unconscionability, release a party from its obligation. [54]

Moreover, nothing in the record allows the court to conclude that the defendants were unaware of the impact of the arbitration clause or that they were otherwise limited in understanding its impact.[55] The defendants had to acknowledge their assent to the arbitration provision by writing their initials next to it. The defendants acknowledge that there was some discussion regarding the arbitration provision, so they were aware of it.

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50 *Eagle*, 157 Ohio App.3d at 173, at ¶ 56, citing *Harper v. J.D. Byrider of Canton*, 148 Ohio App.3d 122, 2002-Ohio-2657, 772 N.E.2d 190, at ¶ 16.
51 See *Robbins*, at ¶ 41.
52 *O'Donoghue*, at ¶29, citing *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 692 N.E.2d 574, syllabus.
53 *O'Donoghue*, citing *ABM Farms*, at 503, 692 N.E.2d 574.
54 *O'Donoghue*, citing *Garcia v. Wayne Homes*, 2nd Dist. No.2001 CA 53, 2002-Ohio-1884.
55 See *Vanyo*, at ¶ 19.

The plaintiff's salesperson made a statement to the effect that the plaintiff builds quality homes and that there would not need to be an arbitration. However, this was only a statement of optimism, and procedural unconscionability does not result because a salesperson makes the party feel that the particular provision at issue is "routine."[56] Such a statement as was made by the salesperson in this case does not constitute a misrepresentation. [57]

Under these circumstances, the court cannot find that this was a contract of adhesion.[58] Similarly, given the public policy in favor of arbitration as stated in both federal and state law, this court is unable to say that the arbitration clause in and of itself is unconscionable.

By the same token, to defeat a motion for stay brought pursuant to R.C. 2711.02 on the basis of fraud, a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, was fraudulently induced.[59] In considering the short length of the arbitration provision, the fact that the arbitration provision is not hidden or in fine print, and the fact that the arbitration provision is typical and not out of the ordinary, the court finds that there is no evidence of fraudulent inducement in this case. [60]

Based upon the above analysis, the court finds that the issues which have been

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56 See *Robbins* at ¶ 28.
57 See id.
58 See O'Donoghue, at ¶ 28.
59 *ABM Farms, Inc. V. Woods*, 81 Ohio St.3d 498, 1998-Ohio-612, 692 N.E.2d 574, at the syllabus.
60 See *ABM Farms* at 503, 692 N.E.2d 574.

raised in this case are properly referable to arbitration in Clermont County, that there are no grounds that exist to render the arbitration clause unenforceable, and that the plaintiff's motion to stay the proceedings in this court until the issues raised in the pleadings can be arbitrated is well-taken and shall be granted.

Although the court has not addressed the mediation clause separately, the analysis which has been provided herein also applies to it. The plaintiff's motion to stay the proceedings pending mediation is also granted. In particular, the court would note that the mediation is to occur through the American Arbitration Association just the same as the arbitration. Also, for the reasons which have been stated previously as to the arbitration provision, the mediation shall be held in Clermont County rather than Jefferson County, Kentucky, pursuant to R.C. 4113.62.

IT IS SO ORDERED.

DATED: 8-16-05

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were mailed by regular U.S. Mail to all counsel of record and unrepresented parties on this 16th day of August 2005.

Tammy Merz